EXHIBIT 16
DATE 1-24-07
HB 203

November 30, 2006

Charles Brasen, Hearings Examiner
Department of Natural Resources and Conservation
PO Box 201601
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Subj: 1) Response to Proposal For Decision dtd 11-13-06 in the Matter of Smith Valley Petition for Controlled Groundwater Area No. 76LJ 30015063.

I would like to submit exceptions to the following decisions while acknowledging that it is not a complete list of exceptions:

Exception 1: Pg 1 of 22 line 6 – Exception to version of law used. The CGA petition was filed in 2004. **Authority referred to:** Montana Water Use Act, Mont. Code Ann. 85-2-506/507(**2003**) not 2005.

Exception 2: Pg 1 of 22 line 7 – Exception to the "hearing" held April 24, 2006. The MCA 85-2-506/507 (2003) provides a public hearing for laypersons (attorneys not required) to present their evidence and testimony before a hearing examiner. I do not believe a proper public hearing occurred April 24 – 28, 2006.

The Smith Valley CGA public hearing was unlike any other CGA hearing in DNRC history. The recorded pre-hearing conferences and the recording of the five-day hearing are proof by themselves that the public hearing intended by the legislators specifically for a lay person was actually a trial process in which no petitioner/proponent was qualified to participate without legal representation.

The five-day trial (hearing) started on April 24, 2006 and the July 25, 2005 Order Setting Schedule and Procedure could only be considered reasonable for lawyers to understand and execute.

Further proof that Smith Valley petitioners' hearing was drastically different than any other to date is found in the public hearing/procedural format afforded prior CGA petitions. (See Horse Creek, North Hills, Hayes Creek, Idaho Pole, Larson Creek, Old Butte Landfill, and Sypes Canyon CGA records.) For example: Horse Creek Hearing Examiner handed out instructions 15 minutes prior to the hearing and no "discovery" was required.

For example, petitioners never had to individually respond to months of motions, provide unlimited hours of depositions and photocopy thousands of pages of exhibits to be served to all interested persons four weeks prior to the hearing, etc. This is a small list of the hearing process differences for Smith Valley petitioners.

Authorities relied upon: MCA 2-3-111 (2003) "Opportunity to submit views-public hearings. Section 1 Procedures for assisting public participation must include a method of affording interested persons reasonable opportunity to submit data views, or arguments orally or in written form prior to making a final decision that is of significant interest to the public." This statue implements the **Montana Constitution, Section 8** guaranteeing "the public has the right to expect governmental agencies to afford such reasonable

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opportunity for citizens' participation in the operation of the agencies prior to the final decision as may be provided by law."

The **MCA 85-2-506/507 (2003)** these statues establish the procedure for a CGA hearing for lay persons and were the basis for the format of previous CGA hearings in this state. No changes to these statutes have been made that would warrant changes in hearing procedures that Smith Valley petitioners were subjected to in our hearing.

Furthermore the hearing examiner acknowledged in his letter of July 25, 2005 that he was without departmental or legislative guidance in establishing the format for this hearing. As he noted, "Until the Legislature specifies a procedure or the Department adopts administrative rules to govern proceedings of this type, the Hearing Examiner will not force all parties into a contested case type of process." Despite the Hearing Examiner's ruling that he would not force parties into a contested case hearing, he failed to rely on previous hearing format for this hearing. As a result, significant evidence and testimony was not allowed to be entered into the record contrary to the public hearing procedures for all prior CGA hearings.

The **July 25, 2005 Order Setting Schedule and Procedure** failed to meet the standards established by the **Montana Constitution and MCA 2-3-111** to afford the public reasonable opportunity to submit data or testimony. It also failed to provide a process promised by the **MCA 85-2-506/507 (2003)** that was usable for lay people without representation.

Exception 3: Pg 2 of 22 line 20 – Exception to Petitioner Bill Obermayer reduced to limited party. Mr. Obermayer's right to participate as a full party was taken from him because he wanted to give his prepared testimony as a petitioner and not as a witness of a quasi-lawyer. AND

Exception 4: Pg 5 of 22 lines 26- 32 and pg 6 lines1 & 2 – Exception to Petitioner Garber's stricken testimony. Mr. Garber followed the rules of **July 25, 2005 Order Setting Schedule and Procedure** and requested in writing to be a limited party. Unlike Gibson/Sudan Group, he also followed the H.E. rules that stated that limited party would not be involved in discovery. **July 25, 2005 Order Setting Schedule and Procedure page 16 Item 6. Discovery** – "There will be no discovery of Limited Parties." The Hearing Examiner acknowledged Mr. Garber's request to be a limited party in the minutes of the June 30, 2005 prehearing conference.

Shawna Floyd listed Mr. Garber in both witness lists and she was never asked to provide Mr. Garber's testimony to opponents. Therefore their surprise on page 5 line 32 was caused by not reading the hearing examiner's minutes acknowledging his limited party status or by DNRCs error on the official service list. Neither error should have negatively impacted the petitioner's right to testify. His stricken testimony is a terrible injustice to him as a citizen of this state.

Prior CGA hearings listed in Exception 2 allowed each side to give their testimony and submit all their evidence without forfeiting their right to be involved or limiting their testimony/data.

Authorities relied upon for both Exceptions 3 and 4: Montana Constitution, Section 8, MCA 2-3-111 (2003), MCA 85-2-506/507 (2003) as stated in Exception 2, and July 25, 2005 Order Setting Schedule and Procedure.

Exception 5: Pg 3 of 22 lines 16-21 – Exception to the limited number of exhibits that were accepted from the petitioners and the absolute shutout of their expert witness, Vivian Drake's exhibits74 - 81.

(1) Petitioners prepared approximately 99 hard exhibits, only 8 were accepted. None of Ms Drake's exhibits were accepted even though Shawna Floyd requested the hearing examiner take judicial notice of them as they were prepared using publicly available data from the Montana Bureau of Mines and Geology website. Her testimony was also restricted from covering the data. (Refer to tape of hearing April 25, 2006 testimony) According to July 25, 2005 Order Setting Schedule and Procedure Page 18 of 27 Item 8 (4) "The hearing examiner may take notice of judicially cognizable facts and generally recognized technical or scientific facts within the departments specialized knowledge."

(2) Many exhibits were objected to by opposing lawyers and not allowed for reasons including the fact they were 3 weeks old instead of 4 weeks old. Refer to DNRC record Pre-hearing Conference April 4, 2006, specifically Shawna Floyd's request to allow expert witness exhibits since there was no surprise and opponents had three weeks to examine the publicly obtained data, in fact duplicating it for their objection motion, Smith Valley Index Full Party/Word.doc. and taped record of April 25, 2006, specifically Vivian Drake testimony.

(3) Inconsistent treatment and application of rules: when opponents' attorneys missed the deadline to provide notice to depose DNRC staff, they were allowed to depose. When proponents' attorneys missed deadlines to provide discovery responses they were extended. However, when petitioners' missed their first deadline with P-Exhibits 74 – 81 and even though they were served 3 weeks before the hearing, they were excluded and their expert witness's testimony was also not allowed to discuss their content.

(4) Exhibits were rejected many times due to a "lack of foundation." I had been assigned the "quasi-lawyer" by the hearing examiner and was clueless as to the meaning "foundation." I had researched prior CGA hearings and prepared for over 8 months to submit many exhibits and share my story. Many of the other 54 lay proponents and our expert witness had also prepared in accordance with prior hearing procedures.

(5) More evidence may have been able to be introduced under the trial-like rules if I, Shawna Floyd, had been allowed to witness. I was not allowed to testify even though I had obeyed all rules and procedures, including undergoing 12 hours of deposition for Mr Battle and Mr Henning. I was the only petitioner of 54 to be deposed. (See Gibson Exhibit List # 50 and 62 Floyd's Deposition.)

I provided my name on two witness lists. The last one was signed by myself and I identified myself as a lay person according to the hearing examiner's instructions during the April 4, 2006 Pre-hearing conference. My request to testify was objected to and denied during the hearing. (Refer to hearing record.)

On April 24, 2006 we were confused and effectively shut out due to the trial style adopted by this hearing examiner. While the discovery and trial process used was a "reasonable opportunity" for a lawyer, it was <u>not</u> a reasonable opportunity for lay people to operate under. Since 2004, I had relied upon the MCA 85-2-506/507 promise that

attorneys were not required. If so, attorney terminology should not have been necessary to submit evidence. (Refer to hearing recording)
Authority relied upon: July 25, 2005 Order Setting Schedule and Procedure Page 18 of 27 Item 8 (1) There was no common agreement to the stipulation of common law and statutory rules of evidence therefore, in accordance with the hearing examiner guidelines, "...all evidence that possessed probative value, including hearsay if it is the type of evidence commonly relied upon by reasonably prudent persons in the conduct of their affairs." should have been accepted. **MCA Rule 803 (8)** "Public records and reports." **MCA 2-3-111 (2003)** "...affording interested persons reasonable opportunity to submit data views, or arguments orally or in written form ..." **Constitution Section 8 and MCA 85-2-506/507 (2003) as stated in exception # 2.**

Exception 6: Page 3 line 25 and Pg 9 line 8 and Pg 11 line 10 – Exception to exhibit G95B and the witnesses testimony who supplied it. This exhibit was not listed on the Gibson/Sudan exhibit list, nor served to full parties. It was objected to by Shawna Floyd and others (April 28, 2006) based on its misleading low representation of the number of wells inside the proposed CGA, the scale size of well dots and the misleading title. It is not an official GWIC map, it was created by a surveyor – not a water expert - yet the hearing examiner accepted it and refers to it as GWIC data in the Proposal for Decision.

Again proponents experienced inconsistent treatment and application of rules. Hydrologist Vivian Drake's testimony was restricted to two year old data, petitioners' official GWIC website Exhibit #2 "GWIC Well Data" is not accepted and then this surveyor's self-made map is given reverence in the proposal for decision.

Cross-examination of this witness was limited by the hearing examiner (Refer to hearing record for April 28, 2006) Establishing the credibility of this witness was thwarted by the hearing examiner in spite of full party proponent Kay Mitchell's request to do so. Undue weight was given to this surveyor's non-qualified statements and self-made exhibits. Under cross by Shawna Floyd he could not substantiate his claims that future development would be limited due to "slope" or "deadend roads". He is not appointed or elected to a Flathead County planning board/committee and has no advanced knowledge of what planning documents will be accepted, despite this lack of expert planning status, his word for word testimony was used by the Hearing Examiner on page 10 of 22 Item 14 to discredit the petitioners claim. **Authority relied upon: July 25, 2005 Order Setting Schedule and Procedure, Disclosure deadline for exhibits and disclosure of witness' testimony. Montana Constitution, Section 8, MCA 2-3-111 (2003), MCA 85-2-506/507 (2003) as stated in Exception 2.**

Exception 7: Page 14 line 15 Exception to "The record does not show that public health, safety, or welfare requires corrective control." Proponents were not allowed to share concerns, exhibits or testimony concerning water quality. Refer to Pre-hearing conference April 4, 2006 record. **Authorities relied upon: Montana Constitution, Section 8, MCA 2-3-111 (2003), MCA 85-2-506/507 (2003) as stated in Exception 2.**

Exception 8: Exception to all Rulings on claims: pages 9 – 12: All rulings were based on inadequate evidence/testimony. This inadequate evidence resulted from the adoption of inappropriate public hearing procedures as established in Exception # 2 above. No

findings of fact can be based on a full, fair hearing when testimonies have been stricken, expert witnesses restricted from presenting up to date data and the majority of evidence from proponents has been rejected due to the trial-like procedures adopted and implemented by the hearing examiner. I believe the hearing examiner even violated his own rules for witnessing and presenting evidence **July 25, 2005 Order Setting Schedule and Procedure Pg 22** "Petitioners and Full Parties may present evidence, call witnesses, and cross-examine witnesses at hearing." See record. Example P-72 and stricken testimonies.

Authorities relied upon: July 25, 2005 Order Setting Schedule and Procedure, Montana Constitution, Section 8, MCA 2-3-111 (2003), MCA 85-2-506/507 (2003) as stated in Exception 2 and MCA Rule 803 (8)

Respectfully submitted for the record,

Shawna Floyd

Shawna Floyd, lay petitioner

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CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the Exceptions to Hearing Examiner's Proposal for Decision and Request for Oral Argument Hearing has been served upon all parties listed below on this 4TH day of December, 2006, by US Mail.

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States mail

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